

The rule of law involves a principle of universality, that is to say every person however powerful or wealthy is governed by the ordinary law and is personally liable for anything done contrary to the law. All authority and power, including all aspects of governmental authority and power, must find an ultimate source in the law. It is this principle that ensures that the rule of law differs from the arbitrary exercise of power. All authority is subject to and constrained by the law.

A second aspect of the rule of law is the concept of boundedness: that the law is not all encompassing. There is a substantial sphere of freedom of action. Citizens can only be constrained or punished for violation of the law and in accordance with the law. Where the law ends, so constraint ends. Judges and lawyers are boundary riders maintaining the integrity of the fences that divide legal constraint from the sphere of freedom of action.

The minimum content of the rule of law is that the rights and duties of persons in the community, and the consequences of breach of any such rights and duties, must be capable of objective determination. It is only if this is the case that persons and groups in society can interact with each other with confidence, in an environment of social order. Judicial independence ensures that any such determination is, in fact, objective.

Of course the rule of law is not simply a system that contains rules that must be obeyed. The law is a system to be used by citizens for their own protection and for their own advancement in their relations with the State and with other citizens or organisations.

None of this can happen without the active participation of lawyers both by means of advising people of their rights and obligations and by ensuring that they are enforced. However, enforcement can only be reliable if there is an independent forum for the resolution of disputes about rights and obligations.

A society cannot be governed by the rule of the law without an institutionalised arrangement for the independence of the judiciary. Furthermore, democracy depends on the courts enforcing what the legislature intended, not what the executive wants.

The form of social order which we identify with a society operating under the rule of law can only exist if laws are administered fairly, rationally, predictably, consistently and impartially.

As I have stated previously, fairness requires a reasonable process of consideration of the rights and duties asserted, rationality requires a reasoned relationship between the rights and duties of the outcome, predictability requires a process by which the outcome is related to the original rights and duties, consistency requires similar cases to lead to similar results, and impartiality requires the decision-maker to be indifferent to the outcome.⁴⁷

Any form of improper influence, incompetence, inefficiency or bias is inconsistent with each of these objectives. Without institutionalised

judicial independence, distortions are inevitable. Without a high level of competence, integrity and capacity for impartiality on the part of judges, distortions are inevitable.

As is recognised in the terms of numerous constitutional and international instruments, judicial independence is a fundamental right of citizens. It is not some kind of privilege which judges acquire as a perk of office. It is an aspect of the rule of law. For the reasons I have mentioned competence, integrity and capacity for impartiality is also an aspect of the rule of law. Judicial appointments must be understood in this context which is, in the full sense of the term, constitutional.

The starting point for the impartial administration of justice is some form of institutional autonomy. An effective judiciary requires a distinct esprit de corps and its own legitimising traditions. This is often reflected in distinctive form of dress. The judiciary must be, and be seen to be, institutionalised, a distinct group performing distinct functions.

There are many choices in the institutional design of the judiciary with respect to these matters. Insofar as a polity wishes to be a society in which the rule of law operates, it is essential that the ultimate guardians of the law must have the level of integrity and the status that enables courts to act as an effective constraint on the exercise of power and as a competent source of impartial decision-making.

The judiciary must be independent of any person who may seek to exercise influence on the outcome of legal proceedings, in any manner and for whatever reason. Unless that is so, the rule of law is inevitably compromised.

Obviously, the parties to a dispute are the most likely persons who would seek to exercise such influence. However, persons who wish to manifest their power, or to pursue a political, religious or social agenda, are all likely to seek to have their wishes or views implemented in the course of judicial decision-making. That is, of course, particularly true with respect to judgments that have broader implications, such as constitutional decisions, but it is a form of pressure that could arise in any kind of case. Unless judges are hard to get at, because of institutional autonomy and personal independence, there will be no shortage of persons who try to do so.

Judicial independence does not only involve freedom from direct interference. It also involves freedom from dependence, of a character which may lead to actual, or even perceived, influence, without the need to exert actual interference.

People who are used to getting their way do not usually take kindly to their wishes being frustrated. In the past that has included the aristocracy, when it was the centre of social and economic power. These days such centres of power include major corporations and the mass media. Throughout history, the executive branch of government has been such a centre of power.